

Leaky Tubs Sink Plaintiffs' Class Certification

BY CLIFTON GRUHN

In *Evans v. Lasco Bathware*, a California appellate court affirmed denial of class certification based on the need for individualized damage determinations, which the court found trumped the commonality factor. According to the plaintiffs, a defective design in a shower pan replacement system caused unique damages to the area surrounding the tub. The plaintiffs' expert testified that the damages were capable of calculation through a formula that would obviate the need for individual damage assessments. The defendants argued that no such formula was available because of the various materials and techniques used for installing its shower pans.

Noting that the evidence both supported and refuted the plaintiffs' contention that a formula could be used to determine class-wide damages, the appellate court found that sufficient evidence existed on which the lower court could base its finding that individualized damages were not amenable to a one-size-fits-all formula. In addition to individualized damages barring class certification, the court noted that the proposed class representatives were inadequate because in an apparent attempt to avoid individualized damage determinations from blocking certification, they attempted to limit the claims of putative class members to replacement of the shower pans. The court found that this limitation "forfeit[ed] additional recoveries... class members might otherwise be entitled to recover," and concluded that the representatives did not adequately represent the class members' interests.

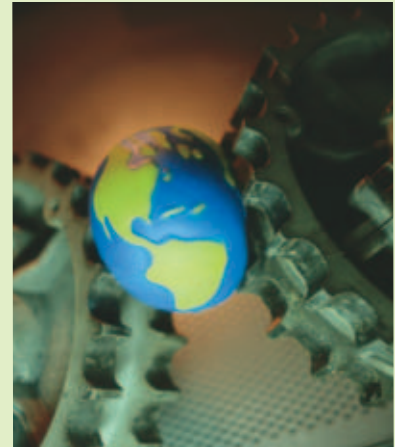


Leaky tub class hung out to dry

Standards of Review for Class Certification Appeals Narrowed

BY JONATHAN HART

In *Yokoyama v. Midland National Life Insurance Company*, Aug. 28, 2009, the Ninth Circuit narrowed the deferential standard of review that is generally afforded to district court class certification decisions. The plaintiffs' complaint alleged that the defendant marketed annuities in violation of the Hawaii



Standard of review in tighter squeeze

Deceptive Practices Act. The district court denied class certification based on its conclusion that the Act required a showing of individualized reliance. Because the denial of certification was premised on a purely legal issue, the appellate court employed a de novo review and reversed the district court's decision, finding that reliance under the Hawaii statute is judged by an objective standard suitable for class certification. The court noted that "the overall standard of review is for abuse of discretion" when class certification is on appeal, but that a literal interpretation of this standard would conflict with the now bedrock U.S. Supreme Court precedent of *Salve Regina College v. Russell* (1991) that all issues of law must be reviewed de novo. Accordingly, the appellate court held that "underlying rulings on issues of law must be reviewed de novo even when they are made in the course of determining whether or not to certify a class."

In a concurring opinion, Judge Smith agreed with the result but criticized the majority for its unnecessary departure from the "abuse of discretion" standard. Judge Smith reasoned that the district court's interpretation of the Hawaii Act was an error of law which "is per se an abuse of discretion." Thus, in Judge Smith's view, the abuse of discretion standard was sufficient to resolve the case.